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# 70616: Australian Constitutional Law Notes

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# 1 Characterisation and Interpretation

## 1.1 Characterising a Law – What is it?

- ❖ Determining whether an Act is supported by a Head of Power.
  - ⇒ Is the Law “with respect to” an enumerated head of power ie within the scope
  - ⇒ Is it ‘Within power’ and therefore constitutionally valid
  - ⇒ Look at what the law actually does ( *First Uniform Tax Case* )

*Richardson v Forestry Commission (1988)*  
**Deane J**  
*Tasmanian Dam Case*  
**Mason J**

## 1.2 Summary Steps of Characterisation / Problem Solving

1. Identify possible head of power
2. Understand subject-matter (or purpose) of heads of power → **scope**
  - ⇒ look at words of constitution and case law → how has it been interpreted and what limits has HCA imposed)
3. Determine whether the law is ‘with respect to’ the scope (case law)
  - a) **Subject Matter** → **sufficient connection** to the scope
  - b) **Purpose** → **reasonably appropriate and adapted** to the purpose of object
    - ⇒ For a legitimate end
  - c) **Incidental** → **reasonably appropriate and adapted** to the purpose of object and (may) includes notion of **necessary to facilitate** / implement
4. If determined impugned Cth law is within power → it must be valid
  - ⇒ unless contrary to an express or implied Constitutional prohibition
5. Review limitations
  - a) Implied **freedom of political communication** ss. 7 & 24 & 128
  - b) Express Freedom of Religion **S 116**
  - c) Express and implied (covering field) Acquisition on Just terms **S 51 (xxxi)**
  - d) Express Trial by jury **S 80**
  - e) Express discrimination based on State **s 117**
  - f) Express Free trade within Cth **s 92**
  - g) Melbourne Corporation Doctrine - Intergovernmental immunities
  - h) Judicial power (separation, persona designate, usurpation, Kable(state) **Ch III**
  - i) Implied immunity of instrumentalities - Cigamatic **ss 109 & 5**
  - j) Express **S 109** inconsistency
6. If constitutionally invalid, consider **reading down** and **severance**

If State laws involved

### TIP

The ‘story’ is not that important → focus on the **words used in the impugned legislation** and whether they are beyond power

**Note:** Constitutional interpretation in Australia is to be interpreted broadly (*Engineers Case*)

### Jumbunna Principle

Court should always lean to a broader interpretation → unless something in context or rest of the Constitution indicates narrow interpretation will best carry out objective and purpose. (1908)

### Other Scope Considerations

- i. Where the Commonwealth Parliament possesses power to make a law in relation to an activity, **it may prohibit that activity absolutely or permit it conditionally.**
- ii. **Conditions or criteria** which authorise an otherwise prohibited activity need have **no relevance to the subject matter** of the Commonwealth's legislative power pursuant to which the prohibition was imposed. In
- iii. **Not invalid because touches/ affects subject outside Cth power** or because it can be characterised (even mainly *Fairfax*) as a law upon a subject outside power.
- iv. **need not relate exclusively** to enumerated grant of legislative power: **Stephen**
- v. Provided a law can **fairly be characterised** as one with respect to a Cth grant of legislative power, it is **irrelevant that it may also be characterised as one with respect to a power exercised by the States**, even where the obvious or primary character of the law falls outside the Commonwealth's legislative powers.

*Murphyores Inc Pty Ltd v Commonwealth (1976)*

*Herald & Weekly Times Ltd v Commonwealth (1966)*

*Murphyores v Cth (197)*

*Actors & Announcers Association v Fontana Films ((1982) at 192*

*Melbourne Corporation*



### 1.2.1 Subject Matter Power: 'Sufficient Connection' Test

Examples of Subject Matter Powers (most heads of power fall under this category)

1. Race power s 51(xxvi)
2. Trade and Commerce power s 51(i)
3. External Affairs Power (external aspects) s 51(xxix)

❖ the Court defines the subject matter by looking at the direct legal operation

- a) the rights, duties, obligations and privileges which it creates, changes, regulates or abolishes

❖ **Test:** Sufficient connection test: Does the Commonwealth Act have a sufficient connection to the subject matter? (*Fairfax case*)

⇒ Sufficiency may be direct and immediate or incidental

*Bank Nationalisation Case, Fairfax (1965), Herald (1966), Murphyores (1976)*

i. must be a 'substantial connection'

⇒ but this is defined as must not be so insubstantial, tenuous or distant that it cannot be regarded as a law with respect to the relevant head of power:

*Herald (1966) Kitto 436  
Tasmanian Dam Case) (1983) Mason J 152.*

⇒ It is valid unless the connection is so insubstantial, tenuous or distant that it cannot sensibly be described as a law with respect to the head of power

*State Banking Case (1947), Dixon J79*

*Melbourne Corporation*

ii. ulterior motive, or the purpose or the indirect consequences which it seeks to achieve, either economic or social, are irrelevant:

⇒ no attempt to discern "true character" of the law

*First Uniform Tax Case (1942) Latham CJ;  
Commonwealth v Bank of New South Wales (1949) Lord Porter;  
Fairfax (1965) Taylor J;  
Actors & Announcers v Fontana (1982) Mason*

⇒ If a law, on its face, is one with respect to a Commonwealth legislative power, it does not cease to have that character because the Commonwealth Parliament seeks to achieve by its enactment a purpose which is not within the Commonwealth's legislative power:

*Nth Suburbs Cemetery (1993)*

iii. may also consider the practical effect or operation of a law:

*Tasmanian Dam Case (1983) Mason J  
Herald (1966)*

⇒ HCA more prepared to consider practical operation in deciding whether it is a law with respect to a grant of Cth legislative power where it imposes some form of prohibition, → pursuant to the s 90 11? or s 92 (free trade Cth):

*Australian Coarse Grains Pool v Marketing Board (1985);  
Miller v TCN Channel Nine Pty Ltd (1986)  
Cole v Whitfield (1988)  
Finemores Transport Pty Ltd v NSW (1978)*

**Held:** Law of characterisation summarised in the form of 5 principles:

1. **Construe** constitutional text with all the **generality** which the words used to admit
2. **Determine character** of law by **reference to right, power, liabilities, duties** and privilege which it create
3. **Examine practical and legal operation** of law to **determine** if there is **sufficiently connection** between law and head of power
4. **Disregard** law may be characterised in another way that can't be fought under head of power, even if 'independent connection' between the two-subject matter
5. If a sufficient connection with a head of power exists, the justice and wisdom of the law, and the degree to which the means it adopt are necessary to desirable, are matters of legislative choice.

*Grain Pool of WA v Cth:*